



STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION
DIVISION OF WATER POLLUTION CONTROL
401 CHURCH STREET
L & C ANNEX 6TH FLOOR
NASHVILLE TN 37243-1534

March 7, 2007

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
RECEIPT #7003 2260 0002 4408 7836

Douglas R. Beaty
Fountain Brook, LLC
8130 Country Village Drive, Suite 101
Cordova, Tennessee 38016

Subject: FOUNTAIN BROOK, LLC
DIRECTOR'S ORDER NO. 07-024D
SHELBY COUNTY, TENNESSEE



Dear Mr. Beaty:

Enclosed is a Director's Order and Assessment of Civil Penalty issued by Paul E. Davis, Director of the Division of Water Pollution Control, under the delegation of Commissioner James H. Fyke. Read the Order carefully and pay special attention to the NOTICE OF RIGHTS section.

It is the Department's position that corporations, limited partnerships, limited liability companies, and other artificial entities created by law must be represented in any legal proceeding resulting from an appeal of this Order and Assessment by an attorney licensed to practice law in the State of Tennessee. Non-attorneys may participate in any such proceedings to the extent allowed by law.

If you or your attorney has questions concerning this correspondence, contact me at (615) 532-0670.

Sincerely,

Vojin Janjic
Manager, Enforcement and Compliance Section

cc: WPC-EFO-M-Joellyn Brazile
WPC-NCO-E&C

**STATE OF TENNESSEE
DEPARTMENT OF ENVIRONMENT AND CONSERVATION**

IN THE MATTER OF:)	DIVISION OF WATER
)	POLLUTION CONTROL
)	
)	
FOUNTAIN BROOK, LLC)	
)	
)	
)	
RESPONDENT)	CASE NO. 07-024D

DIRECTOR'S ORDER AND ASSESSMENT

NOW COMES Paul E. Davis, Director of the Tennessee Division of Water Pollution Control, and states:

PARTIES

I.

Paul E. Davis is the duly appointed Director of the Tennessee Division of Water Pollution Control (hereinafter the "director" and the "division" respectively) by the Commissioner of the Tennessee Department of Environment and Conservation (hereinafter the "commissioner" and the "department" respectively).

II.

Fountain Brook, LLC (hereinafter the "Respondent") is the owner/developer of a 100-acre residential development project, Fountain Brook PD, located in Shelby County on the east side of Berryhill Road, just south of Grove Road, outside Memphis, Tennessee (hereinafter the "site"). Service of process may be made on the Respondent

through its registered agent, Douglas R. Beaty, located at 8130 Country Village Drive, Suite 101, Cordova, Tennessee 38016.

JURISDICTION

III.

Whenever the commissioner has reason to believe that a violation of Tennessee Code Annotated (T.C.A.) §69-3-101 *et seq.*, the Water Quality Control Act, (hereinafter the “Act”), has occurred, or is about to occur, the commissioner may issue a complaint to the violator and may order corrective action be taken pursuant to T.C.A. §69-3-109(a) of the Act. Further, the commissioner has authority to assess civil penalties against any violator of the Act, pursuant to T.C.A. §69-3-115 of the Act; and has authority to assess damages incurred by the state resulting from the violation, pursuant to T.C.A. §69-3-116 of the Act. Department rules governing general water quality criteria and use classifications for surface waters have been promulgated pursuant to T.C.A. §69-3-105 and are effective as the *Official Compilation Rules and Regulations of the State of Tennessee*, Chapters 1200-4-3 and 1200-4-4 (hereinafter the “Rule”). Pursuant to T.C.A. §69-3-107(13), the commissioner may delegate to the director any of the powers, duties, and responsibilities of the commissioner under the Act.

IV.

The Respondent is a “person” as defined at T.C.A. §69-3-103(20) and, as hereinafter stated, the Respondent has violated the Act.

V.

Fletcher Creek and the unnamed tributary to Grays Creek are referred to herein, as “waters of the state,” as defined by T.C.A. §69-3-103(33). Pursuant to T.C.A. §69-3-105(a)(1), all waters of the state have been classified by the Tennessee Water Quality Control Board for suitable uses. Department Rule 1200-4-4, “Use Classifications For Surface Waters,” is contained in the *Official Compilation of Rules and Regulations for the State of Tennessee*. Accordingly, Fletcher Creek and the unnamed tributary to Grays Creek have been classified for the following uses: fish and aquatic life, recreation, irrigation, and livestock watering and wildlife. Further, Fletcher Creek is considered an impaired waterbody for arsenic, lead, low dissolved oxygen, phosphate, physical substrate habitat alterations, and *Escherichia coli* due to pasture grazing, discharges from municipal separate storm sewer system (MS4) areas, and channelization.

VI.

T.C.A. §69-3-108 requires a person to obtain coverage under a permit prior to discharging any substances to waters of the state, or to a location from which it is likely that the discharged substances will move into waters of the state. Coverage under the Tennessee Construction General Permit for Storm Water Discharges Associated with Construction Activity (hereinafter the “TNCGP”) may be obtained by submittal of a Notice of Intent (NOI).

FACTS

VII.

On April 25, 2005, the division received a NOI and Storm Water Pollution Prevention Plan (SWPPP) requesting coverage under the TNCGP for the Fountain Brook PD project. The Respondent was listed as the owner/developer of the site.

VIII.

On May 2, 2005, the division notified the Respondent that the NOI and SWPPP, submitted April 25, 2005, were incomplete and that additional information would need to be furnished before TNCGP coverage could be authorized. The division informed the Respondent of the additional information that would be needed to obtain authorization.

IX.

On May 5, 2005, the division received an updated NOI and SWPPP incorporating the additional information required to obtain coverage under the TNCGP. On this date, the division issued a Notice of Coverage (NOC) to the Respondent for authorization under the TNCGP for the project. Further, the division notified the Respondent that the site was discharging to a stream that has been identified as impaired for siltation and contained Federal or State listed endangered species.

X.

On December 1, 2005, division personnel conducted a site inspection and observed that erosion prevention and sediment control (EPSC) measures along the south

side of the site were not functioning properly and not being maintained allowing large amounts of sediment to migrate off site. At the site, division personnel met with the Respondent's consultant/engineer, Danny Tabrizi, and notified him of the observed deficiencies. Mr. Tabrizi stated that additional EPSC measures, consisting of two additional sediment basins, would be installed on the south and northwest corners of the site. Additionally, during the course of the investigation, it was determined that the entire 100-acre site had been cleared. The site SWPPP, submitted on May 2, 2005, stated that the project was a four-phase project, and that no more than 50 acres would be without permanent cover at any time.

XI.

On December 8, 2005, personnel with the Shelby County MS4 Storm Water Program conducted a site inspection and observed sediment-laden water discharging off site and entering the storm drain system of a nearby neighborhood and entering Fletcher Creek.

XII.

On December 9, 2005, the division issued a Notice of Violation (NOV) to the Respondent for violations observed during the December 1, 2005, site inspection. The NOV requested that the Respondent perform the following actions:

- Install EPSC measures to eliminate the discharge of sediment off-site.
- Reduce the total disturbed, unstable area of the site to 50 acres or less.

- Within 10 days, submit inspection reports from May 5, 2005, to the date of the letter.
- Within 15 days, submit a written response describing corrective actions taken at the site to correct the observed violations.

XIII.

On January 3, 2006, the Respondent submitted documentation of corrective actions implemented at the site. The Respondent stated that approximately 45 acres of the site had been stabilized and the sediment basins and their outlet structures had been repaired.

XIV.

On March 24, 2006, division personnel conducted a follow-up site inspection and observed that the sediment basin at the south side of the site was not functioning properly and had not been maintained allowing large amounts of sediment to discharge off site from two locations.

XV.

On April 3, 2006, the division issued a second NOV to the Respondent for violations observed during the March 24, 2006, site inspection. The NOV requested that the Respondent perform the following actions:

- Install appropriate EPSC measures to eliminate the discharge of sediment off site.

- Stabilize portions of the site that remain inactive for more than 15 days.
- Submit a written response describing the corrective actions taken to correct the violations observed on site within 7 days.
- Submit site-inspection reports from January 1, 2006 to the date of the NOV, within 10 days.

XVI.

On April 7, 2006, the division received a response from the Respondent regarding the April 3, 2006, NOV. The Respondent stated that additional EPSC measures would be installed on site.

XVII.

On June 21, 2006, division personnel conducted a site inspection and observed that EPSC measures at the southern side of the site were not functioning properly, allowing sediment-laden water to be discharged off site. Additionally, no EPSC measures had been implemented at the northwest corner of the site along Berryhill Road.

XVIII.

On July 18, 2006, the division notified the Respondent of the violations observed during the previous site inspections and scheduled a Compliance Review Meeting (CRM) for July 28, 2006, to be held at the division's Environmental Field Office in Memphis (EFOM).

XIX.

On July 28, 2006, a CRM was held to discuss ongoing issues at the site. It was agreed, by all parties, that the Respondent would repair the north and south sediment basins, install additional EPSC measures at the basin areas including stabilization of the slopes of the basins, and reseed the site where needed.

XX.

On September 25, 2006, the division issued correspondence to the Respondent's contractor, Scott Contractors, Inc., regarding a Notice of Termination (NOT), received via fax, requesting termination of coverage under the TNCGP. The NOT was dated September 18, 2006. Scott Contractors, Inc. was informed that the NOT had been accepted and their coverage under the TNCGP had been terminated as of September 18, 2006.

XXI.

On January 3, 2007, the division conducted a site investigation and observed that EPSC measures at the southern portion of the site were inadequate and not being maintained allowing sediment-laden water to discharge off site. Also, EPSC measures implemented at the northern portion of the site, along Berryhill Road, were inadequate and not being maintained and sediment-laden water was observed migrating off site and entering Fletcher Creek. Further, EPSC measures installed along Pinkerton Road were inadequate and not being maintained allowing sediment to migrate off each lot and enter the storm drain system.

XXII.

During the course of investigating this matter, the division incurred damages in the amount of FIVE HUNDRED FIFTY THREE DOLLARS AND FIVE CENTS (\$553.05).

VIOLATIONS

XXIII.

By violating the terms and conditions of the TNCGP, the Respondent has violated T.C.A. §§69-3-108(b) and 69-3-114(b), which state:

T.C.A. §69-3-108(b):

(b) It is unlawful for any person, other than a person who discharges into a publicly owned treatment works or a person who is a domestic discharger into a privately owned treatment works, to carry out any of the following activities, except in accordance with the conditions of a valid permit:

- (1) The alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the state;
- (2) The construction, installation, modification, or operation of any treatment works, or part thereof, or any extension or addition thereto;
- (3) The increase in volume or strength of any wastes in excess of the permissive discharges specified under any existing permit;
- (4) The development of a natural resource or the construction, installation, or operation of any establishment or any extension or modification thereof or addition thereto, the operation of which will or is likely to cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical, radiological, biological or bacteriological properties of any waters of the state in any manner not already lawfully authorized;
- (5) The construction or use of any new outlet for the discharge of any wastes into the waters of the state;
- (6) The discharge of sewage, industrial wastes, or other wastes into water, or a location from which it is likely that the discharged substances will move into waters;

T.C.A. §69-3-114(b):

In addition, it is unlawful for any person to act in a manner or degree which is violative of any provision of this part or of any rule, regulation, or standard of water quality promulgated by the board or of any permits or orders issued pursuant to the provisions of this part; or fail or refuse to file an application for a permit as required in §69-3-108; or to refuse to furnish, or to falsify any records, information, plans, specifications, or other data required by the board or the commissioner under this part.

XXIV.

By discharging sediment into waters of the state that resulted in a condition of pollution, the Respondent has violated T.C.A. §§69-3-114(a), and 69-3-114(b), as referenced above.

T.C.A. §69-3-114(a):

It shall be unlawful for any person to discharge any substance into waters of the state or to place or cause any substance to be placed in any location where such substances, either by themselves or in combination with others, cause any of the damages as defined in §69-3-103(22), unless such discharge shall be due to an unavoidable accident or unless such action has been properly authorized. Any such action is declared to be a public nuisance.

ORDER AND ASSESSMENT

XXV.

WHEREFORE, pursuant to the authority vested by T.C.A. §§69-3-107, 69-3-109, 69-3-115, and 69-3-116, I, Paul E. Davis, hereby issue the following ORDER and ASSESSMENT to the Respondent:

1. The Respondent shall, by April 20, 2007, implement appropriate EPSC measures designed by a professional engineer or other qualified professional to assure that no material leaves the site and enters waters of the state and

provide written notification of completion to the manager of the division's EFOM located at Suite E-645, Perimeter Park, 2510 Mount Moriah Road, Memphis, Tennessee 38115. A copy shall also be submitted to the manager of the division's Enforcement and Compliance section located at 401 Church Street, L&C Annex 6th Floor, Nashville, Tennessee 37243.

2. The Respondent shall maintain appropriate professionally designed EPSC measures, including monitoring all sediment basins on site, to ensure that no material leaves the site and enters waters of the state. These professionally designed controls shall be maintained until project completion.
3. The Respondent shall, by April 20, 2008, attend a Fundamentals of Erosion Prevention and Sediment Control Workshop provided by the department and submit documentation of successful completion to the manager of the division's EFOM and the manager of the division's Enforcement and Compliance section located at the addresses referenced in Item 1.
4. The Respondent is hereby assessed a CIVIL PENALTY in the amount of TWENTY FOUR THOUSAND DOLLARS (\$24,000.00).
 - a. The Respondent shall pay SIX THOUSAND DOLLARS (\$6,000.00) to the division by April 20, 2007.
 - b. The Respondent shall pay EIGHT THOUSAND DOLLARS (\$8,000.00) to the division by May 20, 2007, if, and only if, the Respondent fails to comply with Item 1 above in a timely manner.

- c. The Respondent shall pay EIGHT THOUSAND DOLLARS (\$8,000.00) to the division within THIRTY (30) DAYS if, and only if, the Respondent fails to comply with Item 2 above.
 - d. The Respondent shall pay TWO THOUSAND DOLLARS (\$2,000.00) to the division by May 20, 2008, if, and only if, the Respondent fails to comply with Item 3 above in a timely manner.
- 5. The Respondent is hereby assessed DAMAGES in the amount of FIVE HUNDRED FIFTY THREE DOLLARS AND FIVE CENTS (\$553.05) payable and due by April 20, 2007.
 - 6. The Respondent shall otherwise conduct business in accordance with the Act and rules promulgated pursuant to the Act.

Further, the Respondent is advised that the foregoing Order is in no way to be construed as a waiver, expressed or implied, of any provision of law or regulations. However, compliance with the Order will be one factor considered in any decision whether to take enforcement action against the Respondent in the future. The director may, for good cause shown by the Respondent, extend for a fixed time period, the compliance dates contained within this Order.

To be eligible for this time extension, the Respondent shall submit a written request to be received in advance of the compliance date. The written request must include sufficient detail to justify such an extension and include at a minimum the anticipated length of the delay. The director will reply to the Respondent's request in

writing. Should the Respondent fail to meet the requirement by the extended date, any associated CIVIL PENALTY shall become due THIRTY (30) DAYS thereafter.

Issued by the Director of the Division of Water Pollution Control on this
7th day of March, 2007.

A handwritten signature in dark ink, appearing to read "Paul E. Davis", is written over a horizontal line.

Paul E. Davis, P.E.

Director, Division of Water Pollution Control

NOTICE OF RIGHTS

Tennessee Code Annotated §§69-3-109 and 69-3-115, allow the Respondent to secure review of this Order and Assessment. In order to secure review of this Order and Assessment, the Respondent must file with the director at the address below a written petition setting forth each Respondent's contentions and requesting a hearing before the Water Quality Control Board. The Respondent must file the written petition within THIRTY (30) DAYS of receiving this Order and Assessment.

If the required written petition is not filed within THIRTY (30) DAYS of receipt of this Order and Assessment, the Order and Assessment shall become final and will be considered as an agreement to entry of a judgment by consent. Consequently, the Order and Assessment will not be subject to review pursuant to T.C.A. §§69-3-109 and 69-3-115.

Any hearing of this case before the Water Quality Control Board for which a Respondent properly petitions is a contested case hearing governed by T.C.A. §4-5-301 *et seq.* (the Uniform Administrative Procedures Act) and the Department of State's Uniform Rules of Procedure for Hearing Contested Cases Before State Administrative Agencies. The hearing is in the nature of a trial before the Board sitting with an Administrative Law Judge. The Respondent may subpoena witnesses on its behalf to testify.

If the Respondent is an individual, the Respondent may either obtain legal counsel representation in this matter, both in filing its written petition and in presenting evidence at the hearing, or proceed without an attorney. Low-income individuals may be eligible for representation at no cost or reduced cost through a local bar association or legal aid organization.

Payments of the civil penalty shall be made payable to the "Treasurer, State of Tennessee," and sent to the Division of Water Pollution Control-Enforcement & Compliance Section, Tennessee Department of Environment and Conservation, 6th Floor L&C Annex, 401 Church Street, Nashville, Tennessee 37243. All other correspondence regarding this matter should be sent to Paul E. Davis, Director, Division of Water Pollution and Control, at the address above. Please write your case number on all payments and all correspondence concerning this matter.